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DICTA

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A Preview of The 1949 Convention

By WM. HEDGES ROBINSON, JR.
President, Colorado Bar Association

Plans for the fifty-first annual convention of the Colorado Bar Association indicate it will be a highly successful meeting. Hon. Charles E. Clark, renowned jurist of the Second Circuit Court of Appeals, will be the guest speaker. He has a reputation of being an outstanding after-dinner speaker.

Several innovations in the program are being made this year. The Law Club program, instead of being presented on Friday noon, will be given on Friday evening at the Fine Arts Theatre. Dudley Strickland, chairman of the Law Club Committee, promises a spectacular extravaganza.

For the Friday noon program, a visit has been scheduled to Shepard's Citations plant, followed by a luncheon at the El Paso Club given by the Shepard's firm.

Most of the Sections—Junior Bar, District Judges, County Judges and the Water Section—will meet on Thursday, October 13, instead of Friday morning as was customary. The Probate, Real Estate and Trust Law Section will meet as usual on Friday morning and a part of its program will be devoted to a discussion of the proposed new probate forms.

Another innovation will be the Friday afternoon session when the American Law Institute in cooperation with the state bar will present an institute on small business organizations.

In order to insure full attendance at all meetings, the association has obtained from the various law book publishing houses, valuable contributions of law books for door prizes. Those companies which are donating prizes are:

Matthew Bender and Company—Robins and Johnson's Federal Income, Estate and Gift Taxation Text Service.
Prentice Hall—Seidman's Legislative History of Excess Profits Tax Laws.
Bancroft Whitney Company—Cowdery's Forms for Western States.
American Law Book Company—Insurance—3 Volumes from *Corpus Juris Secundum.*
Shepard's—Colorado Citations.
Commerce Clearing House, Inc.—Pamphlets for the Legal Institute.
West Publishing Company—Modern Legal Forms, 4 Volumes.
Bobbs-Merrill Company, Inc.—Jones Legal Forms.

Finally with regard to the convention, let me make two points clear: (1) The state association does not make any reservations at the Broadmoor except for its own guest speakers. Every one is on a first come, first served basis. The reason that reservations are filled soon after the announcement is that the number attending the convention is increasing and some reservations have been accepted by the hotel from the end of last year's convention. (2) Nominations for officers are made by the Board of Governors, but anyone is privileged to make nominations from the floor. Also, the nominating committee—one member representing each judicial district—will appreciate suggestions from the membership.

The state bar association is your association. Take an active interest in the nominations for officers as well as in all of the activities of the association. I hope to see you all in October.

Program of Annual Conference of the Tenth Judicial Circuit

UNITED STATES DISTRICT COURT ROOM, POST OFFICE BUILDING, DENVER
JULY 6, 7, 8, AND 9, 1949.

Members of the Bar are cordially invited and urged to attend the sessions of the Judicial Conference.

WEDNESDAY, JULY 6, 1949—9:30 A.M.

CONFERENCE OF CLERKS OF COURTS OF THE TENTH CIRCUIT

HONORABLE ELMORE WHITEHURST, Assistant Director, Administrative Office, Unted States Courts, Washington, D. C., presiding:

Subjects for discussion: Jurors, Public Relations, Court Room, Clerk's Records, Clerk's Fees, Taxation of Costs, Executions, Unclaimed Dividends in Bankruptcy Cases, Transfer of Probationers, and Appeal Records.

THURSDAY, JULY 7, 1949—9:30 A.M.

HONORABLE ORIE L. PHILLIPS, Chief Judge, United States Court of Appeals, presiding:

Address of Welcome—HONORABLE JAMES QUIGG NEWTON, Mayor, City of Denver, Colorado

CONTINUATION OF CONFERENCE OF CLERKS OF COURTS OF THE TENTH CIRCUIT

At sessions on Thursday, July 7, the Circuit and District Judges and members of the Bar attending the Judicial Conference are invited to attend and participate in the discussion.

Report of Clerks' Conference on July 6, 1949.
Address, HONORABLE ROBERT B. CARTWRIGHT, Clerk, Court of Appeals, Tenth Circuit, "Shortening the Record on Appeal."
Time will not permit a discussion of all the suggested items. Mr. Whitehurst, Mr. Leland Tolman, Mr. Cartwright and the clerks will select those regarded most important and they will be discussed first.
Possible subjects for discussion: Jury System, Case Dockets, Indices, Filing System, The Minute Book, The Order Book, Criminal Records, Commissioners' Records, and Stanardization of Forms.

FRIDAY, JULY 8, 1949—9:30 A.M.

HONORABLE CARL A. HATCH, United States District Judge for the District of New Mexico, presiding:
Address, HONORABLE ROYCE H. SAVAGE, United States District Judge for the Northern District of Oklahoma, "The New United States Code, Judiciary and Judicial Procedure."
General Discussion.
Report of Committee on Legislation, HONORABLE ROYCE H. SAVAGE, Chairman.
Discussion

ENTERTAINMENT PROGRAM

Sponsored by the Junior Bar Conference of the Colorado Bar Association.
6:00 P.M.—Refreshments, University Club.
7:00 P.M.—Dinner, University Club
Professor ELLIOTT EVANS CHEATHAM, of the Columbia University Law School, will speak on "Conflicts of Law in the Federal System."
(Tickets for the dinner may be obtained from Robert B. Cartwright, Clerk, Court of Appeals.)

SATURDAY, JULY 9, 1949—9:30 A.M.

HONORABLE STEPHEN S. CHANDLER, JR., United States District Judge for the Western District of Oklahoma, presiding:
Address, PAUL ROBARTS, Reporter, "Court Reflections in a Newsman's Mirror."
Report of Committee on Pre-Trial Conference, HONORABLE BOWER BROADDUS, Chairman.
Discussion
Report of each Judge of his Committee to Study the Problems of the Federal Courts and to make timely recommendations concerning ways and means of improving the administration of justice in the Federal Courts.
Discussion
Report of Committee to Study Costs on Appeal, HONORABLE ALFRED P. MURRAH, Chairman.
Discussion

Current Decisions In Constitutional Law

BY EDWARD H. SHERMAN
of the Denver Bar

The 90 days that have passed since the last "Current Decisions" have not been 90 days that shook the world in the field of constitutional law. Nevertheless, at least two decisions on volatile subjects justify comment beyond a description of the judgments and facts. One of these, *Terminiello v. City of Chicago,* 69 S. Ct., 894, involving the function of "freedom of speech" will be reserved for another issue.

A Schizophrenic Marriage and a Divisible Divorce

The case of *Rice v. Rice,* 69 S. Ct. 751, is a further exploration by the court of the obligation of a state to give full faith and credit to the divorce decrees of another state. It is a smug, logical consequence of the doctrine set out in the *Williams* cases, in a context of reality where people leave their permanent residences to change their homes, spouses or both.

In the *Rice* case the following facts were before the court: After 20 years of married life in Connecticut, Herbert Rice went to Reno, Nevada and started an action for divorce. The complaint and process were handed his wife Lillian at her home in Connecticut. She neither appeared personally nor participated in the trial in Nevada and Herbert was there awarded a decree of divorce. Whereupon he wired Hermoine to join him and they immediately married in Reno, retained a room there, obtained employment in California and shortly thereafter Herbert died. Lillian then brought an action for a declaratory judgment in Connecticut to have herself declared the widow of Herbert, at least insofar as the Connecticut real estate was involved. After a full trial, judgment was entered for Lillian and the Connecticut court found that Herbert had never established a bona fide domicile in Nevada. This was affirmed by the Supreme Court of Connecticut upon the authority of *Williams v. North Carolina,* 65 S. Ct. 1092.

The Supreme Court of the United States determined but one issue: Did Connecticut discharge the duty of respect it owed the Nevada decree under the rule of the second *Williams* case? In a short detached opinion the Supreme Court concluded that the burden placed upon Lillian of proving that the decedent had not established domicile in Nevada was fairly met and was amply supported by evidence, that the court could not re-try the facts nor would it impute that the Connecticut court was unwarranted in denying full faith and credit to the Nevada decree. Thus, so far as property in Connecticut was concerned Lillian was still the widow of Herbert and entitled to inherit this property. The Court did not speak about the interest of Connecticut in pro-

tecting one of its resident citizens who may have been abandoned or left impoverished—it merely said, "this is but the Williams case." One wonders how Hermoine, who married Herbert in reliance upon the Nevada decree, accepted the decision of the omni-present umpire who hovers over these proceedings in the state courts. How "psychotic" is this marriage when the courts permit her to be Herbert's wife but she cannot be his widow!

The Williams Cases Revisited

The decision in the *Rice* case is but a logical outgrowth of the *Williams* cases. In the first *Williams* case, *Williams v. North Carolina,* 63 S. Ct. 207, a quick Nevada divorce where one of the parties has established domicile is held conclusive and entitled to full faith and credit. The wrong or fault of the person who leaves his spouse and establishes such domicile is immaterial to jurisdiction. Under the second *Williams* case, *Williams v. North Carolina,* 65 S. Ct. 1092, the decree is vulnerable to attack and the full faith and credit clause does not prevent an inquiry into the jurisdiction of the court whose judgment is relied upon in another state, even though the decree recites that there was jurisdiction. North Carolina, it is held, in protection of its institutions, may independently examine the question of Nevada's jurisdiction but its findings must be amply supported by evidence.

Many serious questions were left unanswered by these two cases: Thus, may all of the other states as well as the state of matrimonial domicile question the jurisdictional fact? Does the jurisdictional fact become conclusive for all purposes where the spouses contested the issue of jurisdiction or appeared and were afforded the opportunity to litigate such issue? What shall we say of the subsidiary rights which are usually attached to the status of a marriage—rights of property, support, custody, inheritance? Shall they be determined by the court which entered the decree of divorce as in the *Williams* case or is it open for other states upon re-examining the jurisdictional fact of domicile to decide such questions?

The connective tissues to the doctrine in the *Williams* case were soon formed in the following cases: It seemed clear from *Sherrer v. Sherrer,* 68 S. Ct. 1087 and *Coe v. Coe,* 68 S. Ct. 1094 that where both parties have participated in a divorce proceeding and were given full opportunity to contest the jurisdictional issue, the full faith and credit clause precludes the courts of a sister state from subjecting such decree to collateral attack by relitigating the question of jurisdiction. In *Esenwein v. Commonwealth,* 65 S. Ct. 1118, a Pennsylvania court refused to strike down a support order imposed upon the husband who thereafter went to Nevada and obtained a divorce. The Pennsylvania court denied the jurisdiction of the Nevada court and the Supreme Court refused to re-try the facts. In that case the court merely followed the *Williams* case but it foretold an important development. "It is not apparent", said Justice Douglas, "that the spouse who obtained the decree can defeat an action for maintenance or support in another state by showing

that he was domiciled in the state which awarded him the divorce decree . . . I am not convinced that in the absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children".

The Concept of The "Divisible Divorce"

In *Estin v. Estin,* 68 S. Ct. 1213, the concept of "divisible divorce" is clarified and the doctrine applied—a divorce may be good to end a marriage but not good when it affects dependent property rights. In that case the husband and wife resided in New York. The husband deserted her and in an action for separation she was awarded permanent alimony. The husband then moved to Nevada and later obtained a divorce there. His wife was notified by constructive service but did not appear. Having stopped his payments he was later sued in a New York court for unpaid alimony and in defense he set up his Nevada decree. The importance of the case is that New York conceded that husband had established a bona fide residence in Nevada when he procured his divorce there. It would therefore follow that so far as the marriage itself was concerned it had been dissolved and its dissolution was entitled to full faith and credit, but the New York court held that in New York the support order would survive the divorce decree. The Supreme Court agreed. It held that because the marriage relationship had ended did not mean that every other legal incident of the marriage had necessarily ended. New York had clearly an interest in the welfare of its own citizens and was rightfully concerned with the problem of the wife's livelihood and support. Nevada's dissolution of the marriage, though binding in lawfully separating the husband and wife, could not affect the support order decreed by the New York court since the wife had not been personally served in Nevada. The New York judgment for support was held an intangible property interest which could not be stricken in Nevada by a proceeding in which there had not been personal service or the appearance of the wife. The court, therefore, sanctioned the Nevada decree insofar as it affected the marital status but held it ineffective on the issue of alimony.

To return to *Rice v. Rice*—it should be noted the court does not base its decision upon its concern for the interests of Connecticut in the welfare of its citizens. The Connecticut court found that the Nevada decree was not entitled to full faith and credit because Herbert was not then domiciled there. The case is more like *Esenwein v. Commonwealth* rather than *Estin v. Estin.* What would the court have said had Herbert died intestate leaving property in California and Texas. Could these states independently inquire into the jurisdictional facts of the Nevada decree? Would they be bound by the Connecticut declaratory judgment?

Changing a Legal Concept to Match Social Realities?

The *Rice* case shows us how far we have departed from traditional concepts. In our patterns of thinking, rights to alimony or support, rights of

dower or inheritance have seemed like logical necessities and essential ingredients of marriage. But we know that these rights need not be inexorably attached to marriage and under certain circumstances, as the cases show, may not be lost though marriage has been dissolved. To many people a "divisible divorce" will not make sense. Marriage, traditionally, means not just consortium, but also all of the subsidiary rights that have always been part of the marriage institution. It is true that there are far-reaching changes in the family pattern. Changes in economic life have affected family life. Most of the traditional functions of the family have been taken over by other institutions and sociologists speak of the modern family pattern as one in which reproduction and individual personality development remain the sole functions. Perhaps the decisions discussed reflect these changes. In a society "mobile and nomadic" as Justice Jackson characterized it, where one may with ease abandon his spouse and live elsewhere, and our values of marriage and responsibility have changed, it may be realistic to regard a marriage valid for one purpose and invalid for another. At least the decision emphasizes the great need for reconsidering the basic problem. What is our objective when the state grants a divorce? Is the purpose to release one's spouse from an intolerable personal situation or are we dealing with an indivisible status involving important social factors, such as inheritance, children, property rights, etc. In the absence of a uniform divorce law, it is possible that we can judically treat these various aspects of the marriage relationship separately?

Thirteen District Judges Accept Retirement Plan

A Correction of the Judiciary Committee Report

By PHILIP S. VAN CISE, *Chairman*

In the June DICTA, page 143, I erroneously stated that the district judges at a meeting on June 4 found the retirement bill as passed by the legislature, was defective and they "repudiated it in toto". In writing this statement I carelessly relied upon a two-column article in the *Rocky Mountain News* of June 5 stating "State Judges Reject New Retirement Law." Any lawyer should know that the average reporter does not understand legal matters, and should go to the judges for the facts rather than the papers. So I apologize for the same and am sending a correction to the district judges, county judges in counties over 20,000 and the members of the General Assembly.

The facts as now obtained from the judges and Tom Trumble, the reporter at the meeting, are that the judges agreed to become subject to the act, but hoped it could be later amended in some respects so that it would more fully cover their requirements. Hu Henry reports that to date 13 district judges have sent in their acceptances to the State Employees Retirement Board and only one has rejected it.

The Unfair Practices Act of Colorado and Its Recent Amendment

By GEORGE L. CREAMER
of the Denver Bar

Recency of amendment of and widespread prevalence of discussion concerning the Colorado Unfair Practice Act makes desirable at this time some discussion relative to the origin and purposes of the act, its effect upon trade, and the specific nature of recent changes.

Suggested by, or originating concurrently with, their Federal prototype, the Robinson-Patman Act,[1] the Unfair Practices acts—of which the Colorado statute is typical—now exist in twenty-nine states, and have for their fundamental purpose preservation of competition. Their principal features are prohibitions against area or locality discriminations in price, and prohibition of sales of goods at prices lower than the cost of those goods, with certain exceptions detailed hereinafter. Their social significance is broad by reason of their action as a buffer protecting smaller economic units, and so the general economic community, against "deep cut pricing," "loss-leader" selling, or "hot-shotting" of goods, practices whereby the wealthiest competing participant, able longest to withstand self-inflicted losses, may ultimately drive from the market monetarily weaker foes, deriving for himself the benefits, and inflicting upon the consuming community the detriments incident to monopolistic or oligopolistic enterprise.

The Unfair Practices Act is not a price-fixing law,[2] and is not to be confused as some publicists have, perhaps unwittingly, confused it with the Fair Trade Act,[3] a statute which does authorize the fixing of resale prices of trademarked or branded merchandise, as specifically permitted by the Miller-Tydings Act [4] by price maintenance contracts. With the Fair Trade Act this article is not concerned, the area of its effectiveness being quite different from that covered by the Unfair Practices acts, its purpose being basically different, and its current interest less.

Moreover, it is not the purpose of this article to present a discussion of the economic or sociological reasons for such legislation as the Unfair Practices Act, reasons which the author believes to be of impelling cogency and force, sought to be obscured by partisan and distorted comment recently, but it is rather the intention of the author to attempt to state what the act does and why.

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[1] 15 U. S. C., 13a, enacted June 19, 1936, and purposed to prevent discrimination among competing customers, based on rebates, discounts, advertising service charges, or other preferential pricing procedures applying to interstate commerce.

[2] *Dikeou et al. v. Food Distributors Association,* 107 Colo. 38, 50, 108 P. 2d 529 (1940).

[3] '35 C.S.A., Chapter 165, Section 20, enacted 1937.

[4] 15 U.S.C. 1, enacted August 17, 1937, as an amendment to Section 1 of tht Sherman Act (passed July 2, 1890), legalizing contracts prescribing minimum resale prices for trade marked goods where legal under State law.

Legislation to Preserve Competition

Because the concept of "competition" has been considered basic in our economy since the Industrial Revolution, it is only natural to assume that the law would attempt to preserve so universally sanctioned a societal practice. This is indeed the case, the law having early developed a theory of "unfair competition," consisting in the passing off or attempting to pass off upon the public the goods or business of one person as and for the goods of another,[5] or conducting a trade or business in such manner that there is an express or implied representation to that effect. Eventually, however, it become quite clear that the actual dangers to the highly desiderated "competition" did not lie in the direction covered by common-law protective devices. On the contrary, the system which elevated that concept to so high a station had implicit within it the germ of total destruction of the practice, as in monopoly, or complete perversion thereof, as in oligopoly. Since it was clear that these dangers could only be legislatively met, there were enacted in the United States four major pieces of legislation tending toward that end:

1. The Sherman Act, 15 U.S.C 1, July 2, 1890.
2. The Clayton Act, 15 U.S.C. 12, October 15, 1914.
3. The Federal Trade Commission Act, 15 U.S.C. 44, September 26, 1914.
4. The Robinson-Patman Act, 15 U.S.C. 13a, June 19, 1936.

While to some extent effective in the sphere of interstate commerce, or in areas affecting interstate commerce, effectiveness of the Federal legislation was primarily limited to the area of manufacturing and processing and to the field of wholesale selling. Matters of a purely intrastate nature, and the area of retail sales of goods and services first among them, were hardly regulable or cognoscible under the Federal acts. It is that fact that makes the Unfair Practices acts primarily necessary, and that fact that makes them in effect, although not so limited by their terms or by any other substantive requirement of law, primarily applicable to the field of retail selling.

The Unfair Practices Act of the State of Colorado was first enacted in 1937,[6] originating as House Bill No. 642. It was subsequently amended in 1941,[7] and as amended, appears in 1 C.S.A., Chapter 48, Section 302. It has been again amended by the 37th General Assembly, in 1949, by Senate Bill 108, approved by the Governor May 20, 1949.

Whom The Act Covers

The present act, as did its predecessors, applies to "any person, firm, or corporation doing business in the State of Colorado and engaged in the production, manufacture, distribution or sale of any commodity, or products,

[5] 38 Cyc. 756.
[6] Session Laws of Colorado, 1937, Chapter 261.
[7] Session Laws of Colorado, 1941, Chapter 227.

or service or output of a service trade, of general use or consumption, or the sale of any merchandise or product by any public utility."[8] However, motion picture films, delivered under lease to motion picture houses, are not deemed a "commodity or production of general use or consumption," and there are expressly exempted from coverage services or products sold, rendered, or furnished by a public utility, subject to regulation by the Colorado Public Utilities Commission, or by any municipal body.

What The Act Prohibits

1. *Area Discriminations.* Persons covered are prohibited from discriminating between different sections, communities or cities or portions thereof, or different locations therein, by selling or furnishing commodities, products, or services at a lower rate in one such section, community or city or portion thereof, or in one location therein, than in another. Under such acts, meaning of the geographical divisions is quite clear, and the word "location" is used as synonymous with "outlet" in business parlance, the intention being to prevent baseless price differentials in different outlets, in the same area, belonging to the same purveyor of commodities, products, or services.

This prohibition, however, is not absolute, but is subject to certain very definite limitations:

a. *Intent:* In order to come within the prohibited area, the person covered must so discriminate "with intent to destroy the competition of" (i) any regularly established dealer in such commodity, product, or service, or (ii) any person, firm, or private, municipal, or public corpoation which "in good faith intends and attempts to become such dealer."

b. *Meeting Competition:* It is specifically provided that "This Act shall not be construed to prohibit the meeting in good faith of a competitive rate."[9]

c. *Grade, Quality, Quantity, and Transportation:* The act specifically permits differentials, area-wise, predicated upon allowance for differences in grade, or quality, or quantity, or based upon differential cost of transportation of a raw material or commodity from the point of production; or of a manufactured product or commodity, from the point of manufacture.

Cases at *nisi prius* under this section of the act have been rare, and there are, to the author's knowledge, none reported by appellate tribunals, primarily because the interdicted practices, being most likely to involve persons engaged in or whose activities affect interstate commerce, come generally within the purview of Federal legislation. However, should the points arise under state law, it is logical to assume that the courts would give to the concepts of "intent" and of "competition" the same basic treatment accorded them with reference to other sections of the act, particularly those concerning sales below cost.

[8] 37th General Assembly, Senate Bill 108, Sec. 1.
[9] *Ibid.*,

2. *Sales Below Cost:* Persons covered, including any person, partnership, firm, corporation, joint stock company, or other association engaged in business in the State of Colorado, are forbidden to (i) sell, (ii) offer for sale, or (iii) advertise for sale "any article or product, or service or output of a service trade" for less than the cost thereof to such vendor.

Not only are sales below cost so prohibited, but one is not allowed to (i) give, (ii) offer to give, or (iii) advertise the intent to give away "any such article, product, service, or output of a service trade."

The prohibition, however, as in the case of area discriminations, is not an absolute one, but subject to various conditional limitations, and to certain clearly stated exceptions:

a. *Intent:* In order to come within the prohibited area, the person covered must do the prohibited act "for the purpose of injuring competitors and destroying competition."[10] It should, of course, be borne in mind that one is normally presumed to intend the usual consequences of his act, and accordingly if it can be shown that competition is injured or destroyed and competitors are injured as a consequence of the act, and that such consequences were reasonably foreseeable by the author of the act, then intent is probably sufficiently established.[10a]

b. *Exceptions:* Prohibitions upon sales below costs, and give-away sales, as above mentioned, do not apply to the following situations:

(i) Closing out, in good faith, the owner's stock, or any part of it, for for the purpose of discontinuing trade in such stock or commodity.[11]
(ii) Sale of seasonal goods.[12]
(iii) Bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation.[13]
(iv) Sale of goods which are damaged or deteriorated in quality.[14]

In each of the above four cases, however, the exception is subject specifically to the proviso that notice be given to the public. The act does not specify the nature of the "notice" which must be given, that being a matter best ascertained in the light of specific circumstances, upon the criterion of actual suitability to purpose of the device or devices adopted.

(v) Judicial sales.[15]
(vi) Sales "in an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product,

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[10] *Id.*, Sec. 3.
[10a] *Supra*, note 2, at page 48.
[11] Senate Bill 108, Sec. 6(a).
[12] *Ibid.*
[13] *Ibid.*
[14] *Id.*, Sec. 6(b).
[15] *Id.*, Sec. 6(c).

or services or output of a service trade, in the same locality or trade area."[16]

Though very little question arises concerning five of the exceptions—save with reference to the question of *bona fides* in the first and the substantive adequacy of notice with reference to the first four, as heretofore mentioned—numerous problems arise as to the sixth exception, which is, or has heretofore been, the basis of defense in the larger number of cases at *nisi prius*. Accordingly, one of the principal provisions of the amendment to the act, recently adopted, has as its purpose clarification of the concepts involved therein.

3. *Secret Rebates:* Like its Federal prototype, the Robinson-Patman Act, the Colorado Unfair Practices Act discountenances secret rebates, and similar allowances, disallowing "the secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions." [17]

a. *Intent:* The interdicted practices are prohibited only where they are "to the injury of a competitor," and where they "tend to destroy competition."

Though of very apparent substantive importance, such provisions of the state acts have as yet been very little interpreted in the courts, since, by reason of their parallelism with Federal legislation, many cases which might otherwise come within their purview are Federally processed. However, inasmuch as there is a very strong similarity between these provisions and those of Robinson-Patman Act, and some provisions of the Clayton Act, there is an abundance of Federal authority at hand to assist in interpretation, should incidence of violations make it requisite.

What Is "Cost"?

As we have seen, the act provides a trinity of prohibitions, but, of them all, the most important is the prohibition against sales below cost, or give-away sales, since it is in that particular area that the Unfair Practices acts go beyond existing Federal legislation, and it is that feature of the acts which makes them of greatest importance in both retail and wholesale selling operations.

1. *Definitions:*

a. *Production:* Cost, when applied to production, includes cost of raw materials, cost of labor, and all "overhead expenses" of the producer.[18]

b. *Distribution:* As applied to distribution, "cost" is the invoice or replacement cost of the article or product, to the distributor or vendor, whichever of those costs may be lower, plus "cost of doing business."

c. *Overhead Expense:* For purposes of the act, "overhead expense" and

[16] *Id.*, Sec. 6(d).
[17] *Id.*, Sec. 7.
[18] *Id.*, Sec. 3(a).

"cost of doing business" are identical terms, and include all costs of doing business incurred in the conduct of such business. Certain enumerated items must be included unequivocally: (i) Labor, including salaries paid executives and officers, (ii) Rent, (iii) Interest on borrowed capital, (iv) Depreciation, (v) Selling cost, (vi) Maintenance of equipment, (vii) Delivery costs, (viii) Credit losses, (ix) Licenses, (x) Taxes, (xi) Insurance, (xii) Advertising.

For a considerable period of time prior to the war, the cases which were brought under Unfair Practices acts primarily concerned themselves with the element of "cost of doing business" or "overhead costs," inasmuch as the cutting of prices was usually not cutting below the actual cost to the seller of the merchandise being sold. More recently, emphasis has shifted because of the so-called "deep-cutting" of prices, which involves sales at a price below actual replacement or inventory cost of the goods so sold. In cases involving the first type of sale, determination of overhead or operating expenses is naturally of vital importance. In cases of the second type, it is not consequential. Since, where the sale is below cost of the goods, violation is clear without considering overhead. Variant economic and merchandising situations, however, will produce varying patterns of violation, and the problem of overhead or operating costs, though not recently pressing, remains of substantial significance.

Our court, in *Dikeou et al. v. Food Distributors Association,*[19] had before it the problem of overhead costs, and finally decided that "in determining the 'cost of doing business' under the Unfair Practices Act, if a particular method adopted by a merchant cannot, under the facts disclosed, be said to be unreasonable and does not disclose an intent to evade the law, the method so adopted should be accepted as correct."[20]

That particular case involved cash and carry cigarette sales, and depended upon a matter of mills for its determination. There was introduced into evidence by the defendant a cost survey, made by an accountant hired by defendant, theoretical in its nature, and attempting to departmentalize the cost of the business, though in fact the books did not reveal such departmentalization. Adopting a rule of "reasonableness" with reference to the problem, the court stated:[21]

> "There is no contention here that the cost must be absolutely exact. Good faith, however, is necessary. The evidence warrants a finding of lack of good faith in the instant case. This involves also the reasonableness of the theoretical separation of the service department and the cash-and-carry department in ascertaining the cost of doing business. The separation is seriously challenged by plaintiff. The Montana case cited above holds that what is meant by 'cost' is 'what busi-

[19] *Supra*, note 2.
[20] *Id.*, Syllabus 4.
[21] *Id.*, at page 46.

ness men generally mean, namely, the approximate cost arrived at by a reasonable rule.' "

The court then went on to state that under the rule, the theoretical departmentalization—a device attempted to be used by many defendants who do not actually departmentalize upon their books—would not be considered a satisfactory or "reasonable" cost basis.

2. *Establishment.* We have noted above that, as applied to distribution, "cost" is invoice or replacement cost to the vendor, whichever is lower, plus overhead costs. An exception, however, is made in the case of articles, goods, or products purchased at forced, bankrupt, or closeout sale, or sale outside of the ordinary channels of trade. In order that such a cost may be considered, for the purposes of the act, the invoice cost, several special conditions must be met:[22]

a. *Segregation:* The goods, articles, or products must be kept separate from those purchased in ordinary channels of trade.

b. *Advertising:* The goods must be advertised and sold as goods purchased other than through normal channels of trade, and the advertisement must state:

(i) Conditions under which goods were purchased.

(ii) Quantity of goods to be sold or offered.

3. *Cost Surveys:* Where there exists, in the trade or industry of which a violator of the act is a member, an established cost survey for the area in which the alleged violations have taken place, then it "shall be deemed competent evidence"[23] to be used in proving violation of the provisions relating to sales below cost.

There have been, from time to time, problems which have arisen with reference to surveys, as with reference to individual cost studies. They are problems of cost accounting, which is, of course, rather an involved field. Presumably the Colorado court, which has not had occasion specifically to pass upon the matter, would apply to such a survey the same rule of reasonableness applied to individual cost studies in the *Dikeou* case.

Some problems may also arise out of a misuse of the cost survey, for, should any industry be so unwise as to attempt to *agree* upon cost of doing business, rather than to determine statistically what is an industry-wide cost, there could be repercussions under the Sherman Act. It is not necessary to state here, of course, that the Unfair Practices acts in no way countenance such abuses, and the Federal courts, particularly in the California cases involving that problem, have been careful to state that the validity of the act was in no way questioned, but only the propriety of conduct of the particular defendants there involved.

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[22] Senate Bill 108, Sec. 4.

[23] *Id.*, Sec. 5.

Enforcement of The Act

Before enactment of the 1949 amendatory legislation, enforcement of the act could be had in several different ways:

1. *Injunction.* Any person, firm, private corporation, municipal or other public corporation, or trade association might, and still may, bring action to enjoin violation of the act.[24] It was specifically held in the *Dikeou* case that a non-profit corporation was properly a party plaintiff,[25] and most of the cases brought under the act have been by such groups heretofore, though, of course, many are instituted by individuals claiming injury.

a. *Damages:* It is not necessary that actual damage to the plaintiff be alleged or proved.[26]

b. *Allegations:* It is sufficient, in an injunction proceeding or prosecution of any person as officer, director, or agent, to allege and prove unlawful intent of the person, firm, or corporation, for whom he acts,[27] any director, officer, or agent being equally responsible for violation with the person, firm, or corporation for whom or which he acts.[28]

2. *Treble Damages.* If a plaintiff does prove damage, then, in addition to the injunctive relief mentioned, he is entitled to recover three times the amount of actual damage sustained.[29]

3. *Criminal Provisions.* Violation of the provisions of the act constitutes a misdemeanor, whether such violation be as principal, agent, officer, or director. Each "single violation" constitutes such misdemeanor, and the penalty consists of a fine of not less than $100, nor more than $1,000, or imprisonment not exceeding six months, or both.[30]

4. *Contracts.* Any contract which is made in violation of the act is illegal, and no recovery may be had upon it by process of law, there being an express proviso protecting payment of patronage refunds by cooperatives.[31]

Each and every one of the foregoing provisions, still extant in the law, has existed in the previous law, and as a consequence the law, in its major substantive particulars, despite the publicity given it of late, is in no way altered by the amendments, which are primarily procedural in their nature.

Moreover, the constitutional validity of the legislation has not been successfully questioned, and the indication is clear that, if questioned, our court would uphold the law, refusing to inquire into the wisdom of the policy behind it:[32]

"The constitutionality of the act is not challenged either in the

[24] *Id.*, Sec. 9(a).
[25] *Supra*, note 2, at pages 41-42.
[26] Senate Bill 108, Sec. 9(a).
[27] *Id.*, Sec. 5.
[28] *Id.*, Sec. 2.
[29] *Id.*, Sec. 9(a).
[30] *Id.*, Sec. 14.
[31] *Id.*, Sec. 8.
[32] *Supra*, note 2, at page 41.

> briefs or assignments of error. Substantially similar acts have been held by four state supreme courts not to be in violation of federal and state due-process-of-law clauses. *Wholesale Tobacco Dealers v. National Candy & Tobacco Co.*, 11 Cal. (2d) 634, 82 P. 2d 3; *Associated Merchants v. Ormesher*, 107 Mont. 530, 86 P. 2d 1031; *Rust v. Griggs*, 172 Tenn. 566, 113 S. W. 2d 733; 86 U. of Pa. L. Rev. 780; *State v. Langley*, 53 Wyo. 332, 84 P. 2d 767. It has been said that the true purpose of acts of this character was to eliminate destructive price competition and the economic effect of the sale of "loss leaders." It also has been argued that free competition may as easily be destroyed by the unfair practices of below-cost selling as by combinations in restraint of trade. Whether such arguments are sound or such legislation is wise or unwise, is solely a problem for the lawmakers. It is not necessary to cite the numerous authorities which have so held."

Injunctive action under the act was, moreover, upheld in *Old Homestead Bread Company et al. v. Marx Baking Company.*[33]

Moreover, in *Smith Brothers Cleaners & Dyers, Inc. v. People ex rel Rogers,*[34] the court, although holding that certain administrative provisions of chapter 113, S. L. '37, relating to cleaning and dyeing trade were invalid procedurally, held that the basic act was perfectly valid, it being a fair practices act, one section of which very much resembles the Unfair Practices Act. As to this legislation, the court said, quoting *Nebbia v. New York* [35]:

> "The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflect injury upon the public at large, or upon any substantial group of people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unwarranted interference with individual liberty."

Concluding that there was an adequate basis in policy even for fixing minimum prices in the cleaning industry, the court held the act substantively valid.

The 1949 Amendments

The basic structure of the act remaining, then, intact, and verbatim as previously enacted, the basic changes which have been made are four:

1. *Enforcement.* Inasmuch as the provisions previously existing in the act left its civil enforcement wholly in private hands, and inasmuch as little reliance was, in practice, had upon the criminal sanctions, enforcement of the act tended to gravitate into the hands of trade associations and other

[33] 108 Colo. 375, 117 P. 2d 1007 (1941).
[34] 108 Colo. 448, 119 P. 2d 623 (1941).
[35] 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940.

corporate bodies, who were faced with a nearly impossible task, both from the point of time involved, and from the point of view of finance. The situation was not unlike that which had faced many other states subsequent to enactment of their basic Unfair Practices legislation, and that problem has been elsewhere solved by provision for administrative processing of civil enforcement features.

Accordingly, Section 9 of the Act was amplified and broadened to give certain administrative powers to the Director of Revenue:

a. *Powers of Director:* Without prejudice to any of the private rights of enforcement elsewhere detailed, the act provides that "the Director of Revenue of the State of Colorado shall, as an incident to and power of his office, have like and similar powers to those above set forth, and it shall be his duty, upon showing by any person, firm, private corporation, municipal corporation, or trade association, that there is cause or reason to believe that any person or persons subject to the provisions of this Act are violating any term or provision of Section 1 to 7 hereof, inclusive, to prosecute actions for violation of any of the said provisions and of all provisions of this Act, and seek injunctions or restraining orders to enjoin the continuance thereof by any defendant or defendants."[36]

b. *Mandatory Action:* It is mandatory that the Director seek injunctive relief or restraining order to enjoin continuance of violation if any person, firm, corporation, or trade association, in writing and under oath, presents a statement setting forth facts sufficient to constitute a *prima facie* case of violation, and he is empowered for that purpose to sue in the courts.[37]

c. *Counsel:* It is made the duty of the Attorney General and every District Attorney, when requested by the Director, to advise and consult with him concerning institution and prosecution of actions provided for, and to act as counsel, but the Director may select, appoint, and recompense from public funds any attorney-at-law as special prosecutor.[38]

d. *Rules and Regulations:* The Director is given authority to promulgate rules and regulations not inconsistent with the provisions of the act and to publish the same.[39]

e. *Finance:* Provision is made for financing such arrangements by means of a license, at an annual fee of $1.00, required of all persons, firms, corporations, or organizations now required to have store licenses under state law. Such licenses are to issue for the same period as store licenses, and the proceeds are to be credited to the Department of Revenue Administration Fund for enforcement of the provisions of the act, and for no other purpose, overplus to be rendered into the general fund at the end of each year.[40]

[36] Senate Bill 108, Sec. 9(a).
[37] *Id.*, Sec. 9(b).
[38] *Id.*, Sec. 9(c).
[39] *Id.*, Sec. 9(d).
[40] *Id.*, Sec. 9(e).

Such enforcement provisions are in no way unusual. Montana provides for enforcement of its act by the Montana Trade Commission, without additional compensation, the Attorney General acting as counsel to the Commission.[41] Utah provides for enforcement by the Utah Trade Commission, which may hold hearings, and institute action for injunctive relief, such proceedings being conducted by the District Attorneys.[42] Idaho has an arrangement almost identical with that we have recently adopted, whereby enforcement is in the hands of the Commissioner of Finance, to be assisted by the Attorney General.[43] Minnesota has created a Department of Business Research and Development, charged with enforcement of a number of acts, including the Unfair Practices Act,[44] while in Kansas,[45] North Dakota,[46] and Wyoming [47] special duties are given to the Attorney General and to State, County, or Prosecuting Attorneys to enforce the civil provisions of the various state Unfair Practices acts.

2 *Evidence:* It is specially provided, because of certain questions arising under Article V of the amendments to the Constitution of the United States, and Article II, Section 18, of the Constitution of the State of Colorado, being those sections dealing with self-incrimination, that any defendant may be required to testify, under subpoena duly issued, or pursuant to the Rules of Civil Procedure, in actions brought under provisions of the act, and that the books and records of such defendant may be introduced into evidence. It is provided, specifically, that no information so obtained may be used as a basis for a misdemeanor prosecution instituted against such defendant.[48]

3. *Advertising:* Because it has for many years been a patent abuse in the retail trade to advertise "loss leaders" which the persons so advertising did not intend to supply, merely to divert persons into the stores of such advertisers, it is made specifically unlawful to advertise goods, wares, or merchandise which the advertiser is not prepared and able to supply in pursuance of such advertisements.[49]

4. *Prima Facie Case:* By reason of the provisions of the Robinson-Patman Act, persons on the jobbers lists, that is, wholesalers buying from jobbers in carload lots, are necessarily able to purchase goods each at the same price, having attained maximum quantities and so maximum quantity discounts, and similarly, it is impossible for them to purchase—save in case of distressed sales—at prices lower than those accorded under circumstances of maximum quan-

[41] Session Laws of Montana, 1939.
[42] 2 Utah Code Annotated, Chapter 4, Sec. 16A-2-14.
[43] Session Laws of Idaho, 1945, Chapter 206, page 387.
[44] Session Laws of Minnesota, 1947, Chapter 567, pages 1004-1013.
[45] '35 General Statutes, Chapter 50, Article 4 (1947 supplement).
[46] '43 Revised Code, Chapter 51-10, page 3440.
[47] '45 Statutes, Volume 3, Chapter 39, Section 402.
[48] Senate Bill 108, Sec. 10.
[49] *Id.*, at 12.

tity discount. In recent times the most patent violations of the act involved in this discussion have been sales of goods, by retailers, at prices below the prices at wholesale, to such persons upon the jobbers lists. Inasmuch as it is clear that, under such circumstances, the goods so sold could not be purchased legally at such prices, it is provided that showing that the sales price is below such minimal wholesale cost is a *prima facie* case of violation, though, of course, it is specifically provided that such *prima facie* case is rebuttable by showing by the defendant that he has purchased the goods at a price below wholesale price, or prices to persons on the jobbers' lists, or by showing that he has in good faith met the legal price of a competitor.

The statutory provision,[50] is merely an embodiment of a procedural standard necessarily arising out of legally required merchandising techniques, and heretofore uniformly applied at *nisi prius,* doing nothing more than establishing the method of proving a *prima facie* case, though allowing very definitely rebuttal by cogent evidence.

5. *Legal Prices of a Competitor:* The principal defense presented in recent times in cases at *nisi prius* under the Unfair Practices acts is that the defendant has been meeting prices of competitors. However, in order to constitute a defense, it is necessary that it be shown that the prices met are the "legal" prices of a competitor. The phrase "legal price" has proven to an extent confusing, and indeed our Supreme Court said, in the *Homestead* case,[51] "As to the phrases, 'legal consideration' and 'legal price,' no court can anticipate the meaning of such words in advance of their use in particular situations. It will be time enough to pass upon their significance as and when questions concerning them arise. Their meaning here as applicable to admitted facts was plain enough."

While defendants frequently present evidence of prices of competitors, that evidence often relates to persons outside the competitive area of the defendant—as in the cases wherein merchants have boasted that they will meet any posted price in a city—or is distant in time, or clearly covers a price concerning the legality of which no inquiry has been made. To be sure, it is unlikely that any business man can know to a certainty the fiscal arrangements of his competitors, but he should at least be put upon inquiry, and made to show *bona fides* in the meeting of deep-cut prices, before being allowed to escape the consequences of below-cost selling upon a plea of "meeting competition." Any other policy leads to circular violations of the act and to basic violation of its principles.

Accordingly, there have been set up in the act, as procedural guides, certain standards of conduct, with relation to "legal price," in keeping with judicial standards adopted in numerous decided cases, and followed uniformly by the Colorado courts at *nisi prius.*

[50] *Id.*, at 13.
[51] *Supra,* note 33, at 380.

In order that a price met be considered a "legal price" within the act, it is incumbent on the defendant to show:

a. Meeting of a specific price or prices;

b. Of a specific competitor or competitors;

c. In an area directly competitive with defendant;

d. At a time or times when such price or prices were actually competitive with those offered by such competitor.[52]

e. Quotation of such price by such competitor on the same or similar goods, wares, or merchandise.[53]

f. Sale or offer of sale of such goods, wares or merchandise of the competitor in the trade area of the defendant.[54]

g. Quotation of price by defendant directly and immediately in an endeavor in good faith to meet the prices quoted by competitor.[55]

h. Making by the defendant of a *bona fide* effort to determine legality of price.[56]

Amendments Primarily Procedural

Again, this matter is not primarily a change in substance of the act, which remains, as to the basic exception, precisely as it has always been, but it is a statement of procedure, a clarification of elements of proof.

The act in question is one of great economic importance. It is one which has been on our statute books for a period of a dozen years, and under which numerous actions have been brought. It is an act around which controversies of policy rage. It should, however, be understood for what it is, and recognized as being not anomalous, but a normal part of our economic system, prevalent in similar form upon the Federal statute books, and those of more than half of all American jurisdictions.

For the somewhat pedantic form of the article the author apologizes to the reader, but states, in explanation, that, copies of the new enactment being not yet widely available, the form of presentation was hoped to be the most useful in which information, perhaps of practical utility, might be presented.

Allan F. Asher, Independence Bldg., Colorado Springs would like to purchase volumes 100 and 104 in order to round out his set of Colorado reports.

George K. Thomas announced the opening of an office at 807 Ernest & Cranmer Building, Denver, on June 1st.

Inadvertently omitted from previous DICTA was notice of the death of Norman A. Hutchinson, member of the Denver Bar Association. Mr. Hutchinson was only 49 at the time of his death on April 29, 1949.

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[52] Senate Bill 108, Sec. 13(1).
[53] *Id.*, Sec. 13(2).
[54] *Ibid.*
[55] *Id.*, Sec. 13(3).
[56] *Id.*, Sec. 13(4).

Certificate of Title Law Effective August 1st

by LOUIS A. HELLERSTEIN
of the Denver Bar

The Colorado Certificate of Title Act relating to all vehicles propelled by power (other than muscular power), trailers, semi-trailers and trailer coaches (H. B. No. 808) was approved April 16, 1949 and becomes effective August 1, 1949. Under its provisions, new titles are required when a motor vehicle is transferred or mortgaged. The administration of the act is under the Director of Revenue.

In the main, the bill is designed to strengthen Colorado titles, and to have a proper evaluation of a title before the courts. Up to this time, generally, Colorado titles were primarily a measure of protection against thefts, so as to evidence the ownership and, in addition, to tie in a title with the licensing provisions so that the counties and the state could obtain revenue therefrom. The attempt of the present bill is to require a title at all times, which evidences ownership. A purchaser that does not obtain a title endorsed to him acquires no right under the present law. Previously possession of the motor vehicle and payment of a consideration therefor were sufficient, even though for registration purposes a title was required.

The Law's Salient Features

In addition, the vital parts of the bill are as follows:

1. All chattel mortgages upon motor vehicles from and after August 1, 1949, the effective date of the act, will appear upon a title. If a motor vehicle title is presented to a loan or finance company showing no mortgage thereon, it will be presumed such motor vehicle is unemcumbered.

   This situation is contrasted to the situation prior to the effective date of the new title law, pursuant to which mortgages were filed with the clerk and recorders of the various counties. There being 63 counties in Colorado, hopeless confusion resulted, since to be sure of ascertaining that no prior mortgages existed, all counties where a mortgagor resided would have to be searched. Secondly, there was no requirement that a mortgage be noted on a title, and thirdly, after a title was once issued, there was no means of placing a notation as to the lien upon the title. As a result, it can be seen that the title act will be of tremendous value to holders of mortgages.

2. Foreign mortgages; that is instruments executed having the effect of liens or mortgages upon automobiles brought into Colorado at a subsequent date, will be recognized, under the new title act, if such liens or instruments are noted on the title by the proper authority of a foreign state.

Under the present law, regardless of notation on titles of liens or mortgages, or the recording in a foreign state, a chattel mortgage made in a foreign state is recognized in Colorado, but a conditional sales contract even though recorded in a foreign state is not now recognized.

The new law should give equal protection of the law to holders of chattel mortgages as well as conditional sales contracts executed in foreign states.

Mechanics of Filing Mortgages

The act provides the following method of filing a mortgage:

1. The holder of a chattel mortgage presents his chattel mortgage for filing, together with the certificate of title (or, if a new car, the original bill of sale) covering the motor vehicle, to the authorized agent of the Director (either the County Clerk and Recorder if outside Denver, or, in Denver, the Manager, of Revenue), and requests that a new title be issued, showing the mortgage on the title.

2. Filing and recording are made in the county (or city and county) where the motor vehicle is licensed and registered, regardless of the place of residence of the mortgagor or where the motor vehicle is to be kept.

3. The authorized agent makes a certificate to be attached or stamped on the mortgage and on the certificate of title, in which is shown the day and hour on which the mortgage was filed, together with other pertinent information relative to the mortgage.

4. The authorized agent files and indexes the mortgage separate and apart from other instruments.

5. Within forty-eight hours after filing, the authorized agent is required to mail to the Director of Revenue the certificate of tile (or if a new car, the bill of sale) on which he has affixed his certificate respecting the filing of the mortgage.

6. The Director, upon receiving the certificate of title (or bill of sale) with the certificate showing the mortgage, notes such fact upon his records. The Director then issues a new certificate of title showing the mortgage on the title. The certificate of title is then mailed to the holder of the mortgage.

7. The original mortgage, or an executed copy thereof, may be filed with the authorized agent. There is no provision for recording such mortgages. The agent retains the instrument filed.

8. *Second or junior mortgages are handled in the following manner:* such second or junior mortgagee files his mortgage in the same manner as the holder of the first mortgage, excepting that he does not file the title, since the title will be held by the holder of the first mortgage. Upon the filing of such mortgage, the authorized agent notes

the fact of filing and delivers a receipt therefor showing the filing. The authorized agent then, by registered mail, return receipt requested, notifies the holder of the certificate of title to forward the same to him so that notation of the second or junior mortgage may be made thereon. The holder of a title is given fifteen (15) days to forward the title to the agent. Upon receipt of the title, the agent notes the fact of the second or junior mortgage thereon and forwards the instruments in the same manner as that of a first mortgage to the Director, who issues a new title, showing the second or junior mortgage. The title is then returned to the holder of the first mortgage. If the holder of the title fails to send the title in when requested to do so by the agent, he becomes liable for any damages which the holder of a second or junior mortgage may sustain as a result of such mortgage not appearing upon the title.

9. Liens upon motor vehicles have priority according to the time of being filed for record.

Validity of Lien May Be Extended

A mortgage is a valid lien for a period of three years from and after filing. Thereafter, if unpaid, the lien of the mortgage may be extended for successive two-year periods by the holder of the mortgage presenting the certificate of title, on which the mortgage is noted, to the authorized agent with a request for an extension. The authorized agent then notes the extension on the title and forwards the same to the Director. The Director also notes the extension on his records and the certificate of title and returns the same to the holder of the mortgage.

A mortgage which has been filed for record, as provided under the act, and noted on the certificate of title, which has not been released or extended within three years from the date of the filing of the mortgage, is considered as having been paid and a duplicate title may be issued omitting therefrom reference to the mortgage.

The act does not attempt to in any manner affect the validity of mortgages between the parties as long as the rights of third parties have not intervened. A mortgage which is not shown on the certificate of title as provided for by this act, duly executed from and after the effective date of this act, is still valid and enforceable between the parties and also valid and enforceable against third parties who have actual knowledge of the mortgage. This is the law at the present time, and the new Certifiacte of Title Act does not attempt to change the existing law.

Upon a mortgage being released, an application for a new title is made by the owner, or a purchaser or transferee from the owner, or the holder of the mortgage, pursuant to which the authorized agent notes the release upon the title and forwards the same to the Director, who issues a new title omiting therefrom said mortgage. Thereupon, such new certificate of title is issued

and mailed to the owner, if all mortgages have been released, or to the holder of any existing first lien thereon.

Mechanics Liens Not Affected

The act does not change the existing law relative to claims of garagemen or mechanics for lien claims. If a chattel mortgage is taken when a motor vehicle is in a repair shop being repaired, the fact that a certificate of title shows a mortgage does not render a mechanics lien claim inferior to the rights of the mortgagee. However, if the certificate of title shows a mortgage which was in effect prior to a motor vehicle being repaired, or in a shop for repair, the claim of the mortgagee is superior. The law relative to the respective rights of mechanics lien claimants and mortgagees is not affected by the enactment of the Certificate of Title Act Mechanics lien claims are not required to be shown upon the certificate of title.

Chattel mortgages which were taken prior to the Certificate of Title Act continue unimpaired, and the chattel mortgage law in effect at the time the mortgages were taken apply to such chattel mortgages. Releases and extensions of such chattel mortgages should be filed in the same manner as heretofore under the existing law.

Generally, chattel mortgages, or instruments having the effect of chattel mortgages, executed in a foreign state will be recognized in Colorado, as against the rights of innocent third persons having no knowledge thereof, if the foreign certificate of title for such motor vehicle, issued under the laws of any other state, bears a notation on such title of the existence of such foreign mortgage.

The act does not affect or change the form of chattel mortgages nor the requirement of acknowledgement, nor does it change the present law or rights of the parties relative to foreclosure, or any other rights or remedies the holder of a mortgage may have. The substantive law covering these subjects is still in force and effect and will govern mortgages taken under the new Certificate of Title Act.